



REPLY TO
ATTENTION OF

CERE-MM (405-90a)

14 October 1988

MEMORANDUM FOR: SEE DISTRIBUTION

SUBJECT: Revised ER 405-1-12, Release of easements and encroachments

1. Reference CERE-MC letter dated 5 February 1988, subject as above.
2. Referenced letter distributed a proposed change to certain paragraphs in chapter 11, ER 405-1-12 and requested comments. All comments were reviewed and used in the final revision which is enclosed for implementation pending formal change to the ER. Paragraphs 11-125 and 11-128 have been completely rewritten, paragraph 11-131.c. has been revised, and paragraph 11-234.f. has been added.
3. All affected actions presently being negotiated, or those for which commitments have been made, may be completed in accordance with previous policy. However, such actions should be completed no later than 30 September 1989. For all other such actions, the policy guidance shown in the enclosure should be used immediately. Should you believe that implementation as shown above is not appropriate due to unusual circumstances, a request for waiver may be submitted to this office on an individual case basis.

FOR THE COMMANDER:

Encl

DAVID L. COHEN
Chief, Management and Disposal
Division
Directorate of Real Estate

DISTRIBUTION:
COMMANDERS

LOWER MISSISSIPPI VALLEY DIVISION, ATTN: CELMV-RE
MISSOURI RIVER DIVISION, ATTN: CEMRD-RE
NEW ENGLAND DIVISION, ATTN: CENED-RE
NORTH ATLANTIC DIVISION, ATTN: CENAD-RE
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✓ SOUTH ATLANTIC DIVISION, ATTN: CESAD-RE
SOUTH PACIFIC DIVISION, ATTN: CESPD-RE
SOUTHWESTERN DIVISION, ATTN: CESWD-RE

Encl 2

a. Fee-owned land. When fee-owned land for which the Department is acting as disposal agency is found to be surplus to requirements of the federal Government, has been classified as to highest and best use under paragraph 11-116, and disposal is not made under one of the preceding special authorities, the property will be sold under the procedures set out in Section XIV of this chapter.

X b. Easements. Easements that are assignable and marketable will be disposed of in the same manner as fee-owned land as set out in Section XIV of this Chapter, unless disposed of to the owner of the servient estate or to the local sponsor as set out below. Easements will usually be disposed of with land to which they are appurtenant. Easements which are assignable but which have no commercial value or which the estimated cost of continued care and handling would exceed the estimated proceeds from its sale can be considered for disposal by donation under FPMR, Section 101-47.5—Abandonment, Destruction or donation to public bodies, in the same manner as fee-owned land.

(1) Disposal to owner of servient estate.

(a) In accordance with FPMR, section 101-47.313-1, easements of any type may be disposed of to the owner of the servient estate (the land which is subject to the easement) when the continued use, occupancy, or control of the easement is not needed for the operation, use or maintenance of property controlled by the Corps of Engineers. This includes the authority to release restrictions in flowage easements that prohibit construction and maintenance of structures for human habitation.

7 (b) A determination shall be made as to whether the disposal should be with or without consideration on the basis of all circumstances and with the regard to the acquisition cost of the easement. The circumstances and factors leading to this determination shall be documented and retained in the disposal file.

1 Consideration shall be determined by appraising or estimating the fair market value of the fee, free and clear of the easement; appraising or estimating the fair market value of the fee, subject to the easement; and computing the difference, or damage, caused to the fee by the easement.

2 When the easement was acquired at no cost or at a nominal consideration, and such action is otherwise justified under existing circumstances, it may be released without consideration, except that any value of any Government-owned improvements to be left on the property will be obtained. However, if the relinquishment is being accomplished primarily for the benefit of the owner of the servient estate (e.g. to cure an encroachment) the release should be for no less than the appraised value determined by the method set out in 1 above.

3 The consideration determined above will be regarded as the fair value of the easement in accordance with FPMR, section 101-47.313-1.

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(c) In addition to consideration, if any, an administrative charge of the full cost to the Government for the disposal action will be imposed. The administrative charge may be waived upon approval by CERE-M when the disposal is primarily for the benefit of the Government. (This does not include encroachments.)

delete

(d) If the owner of the servient estate is not willing to pay the consideration and/or the administrative charge determined above for the release, but is willing to pay an amount which the District determines is acceptable or when the District believes that imposition of consideration and/or administrative charges are not appropriate, a request for a waiver, with complete justification, may be forwarded to CERE-M for approval.

(2) Disposal to local sponsor. In cases where a local sponsor acquired the easement and conveyed its interests to the United States at no cost, and is responsible for providing all real estate interests required for continued project operation, the easement may be released to the sponsor upon request. The release may be for no consideration, except that an administrative fee shall be charged when the release is for the purpose of curing an encroachment or to permit the sale of the land to a third party. In all other cases, the administrative charge may be waived in whole or in part if the District considers it appropriate.

11-128. Approval for Disposal of Easements. When recommending disposal of an easement, the District Commander will submit the information requested below with request for approval by CERE-M. In the case of singular disposals, the information and request for approval may be submitted with the proposed deed. Where multiple related disposals are contemplated, a disposal plan should be submitted to CERE-M in advance of the disposal actions.

a. Information as to when, from whom, and for what cost the easement was acquired.

b. Identification of the installation or project to which it is appurtenant.

c. The appraised fair market value of the easement, if assignable; or the value as set out in 11-125.b, if being released to the owner of the servient estate.

d. The determination as to consideration and administrative charge with supporting documentation of circumstances and factors leading to that determination.

11-131. Preparation and Execution of Deeds.

c. Authority for Conveyance. Authority for conveyance will be recited in the granting clause. Conveyances under the Federal Property Act will recite: "... under and pursuant to the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended, and the delegation of authority to the Secretary of Defense from the Administrator of the General Services Administration (41 C.F.R. 101-47.601) and the redelegation of authority from the Secretary of Defense to the Secretary of the Army (Air Force) (20 F. R. 7113)." Conveyances to states and their

instrumentalities under the special statutes, listed in paragraphs 11-115 through 11-122, will recite the special statutes, as continued in effect by the Federal Property Act and the delegations. Conveyances to states for wildlife conservation purposes under Public Law 537, 80th Congress (paragraph 11-119a) will cite the special act and recite that the property has been determined surplus under the Federal Property Act and delegations thereunder. Conveyances for the total or partial release of any type of easement or conveyances releasing the restrictions contained in a flowage easement prohibiting the construction and maintenance of structures for human habitation should cite as authority for the conveyance the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended, and 41 C.F.R. 101-47.313-1.

11-234. Negotiated Sales.

f. Encroachments.

(1) Each District with a significant number of encroachments should develop a District policy on the identification, reporting, and curing of encroachments. Any existing District encroachment policy should be reviewed considering the following guidance. The policy may be formulated on a project or District-wide basis and will be approved by the Division. The ideal method of curing an encroachment is either removal of the encroaching structure or cessation of the encroaching use. Because of a variety of circumstances however, these methods are not always possible or preferable. Therefore, the District's policy should address when a negotiated disposal of the minimum amount of land required to resolve the encroachment is appropriate and when a lease, license, or other outgrant is appropriate. When considering a disposal action to cure an encroachment, the primary question is whether that action would have an adverse impact on the project.

(2) The policy should also set criteria for determining whether the Government contributed to a mistake resulting in the construction of the encroachment and whether the encroacher checked the boundary in a manner that the ordinary prudent person would have done. The policy should also address, if applicable at this project, the magnitude of the problem, special circumstances during acquisition or surveying of the boundary, past commitments made to the public, and public relations consideration.

(3) If a disposal is recommended, the consideration will be the appraised fair market value plus an administrative charge. This charge will be set by the District based upon the full cost to the Government for processing the disposal. Appraisal of the encroachment area will be based upon the contributory value of the disposal area to the total ownership. Particulars on legal access, including that which may be implied by operation of law, should be obtained. A determination of the possible use and marketability of the disposal area, if offered on the open market, and the impact of the resolution of the encroachment and clearance of title to the entire occupied ownership should be considered.

CESAD-RE-M (CESAS-RE-MM/28 Feb 91) (405-70c) 1st End Mr. Cary/pbs/FTS
841-6758
SUBJECT: Recommendation for Release of Clearance or Restrictive Easements on
Military Projects

CDR, South Atlantic Div, Corps of Engineers, Room 313, 77 Forsyth Street, SW.,
Atlanta, Georgia 30335-6801 21 MAR 1991

FOR CDR, USACE, ATTN: CERE-MM, WASH DC 20314-1000

1. The proposal present in the basic memorandum constitutes an attempt to formally abandon easement estates. We believe the proposal has merit although we do not envision the situation described as being a frequent occurrence or major problem. We also recognize that the proposed action might not be a practical solution in every jurisdiction. In Georgia, the registrar of deeds has confirmed that the deed format at enclosure 1, when executed, would be a registrable instrument.
2. We favor a general delegation of authority from the Secretary of the Army to execute disposal deeds for real estate valued at less than \$1,000. (In the absence of such a delegation, however, we recommend that proposals to formally abandon easements without consideration be approved on a project by project basis.
3. We have discussed with the Savannah District the need to make decisions concerning abandonment before disposal actions are begun at a particular project. Such decisions must be based on consideration of the fair market value of the easement estates involved; the costs anticipated in disposal actions and costs associated with accountability and enforcement of easement restrictions on use of the property. When it is determined that formal abandonment is the best approach, all underlying fee holders should be treated in the same manner.
4. To date, only an administrative fee has been assessed for the release of the Ft. Gillem aviation easements discussed in the basic memorandum. Recognizing the difficulty associated with record keeping, we recommend that the concept for disposal of the remaining easements at this project be approved.

FOR THE COMMANDER:

3 Encls
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CF (wo/encls):
CESAS-RE-M


A. C. POSNER
Director of Real Estate

- Cost disposing
- custodial costs
- Restrictions



DEPARTMENT OF THE ARMY

SAVANNAH DISTRICT, CORPS OF ENGINEERS

P.O. BOX 888

SAVANNAH, GEORGIA 31402-0888

REPLY TO
ATTENTION OF:

CESAS-RE-MM

28 February 1991

MEMORANDUM FOR Commander, South Atlantic Division, ATTN: CESAD-RE-M,
Atlanta, GA 30335-6801

SUBJECT: Recommendation for Release of Clearance or Restrictive Easements
on Military Projects

1. The proposal set out within this letter recommends a more efficient and less costly method of disposing of clearance or restrictive easements that have been declared excess by the military installations and their commands. It pertains only to those easements which will be released to the servient owner (underlying fee owner) of the land and on which there is deemed to be no fair market value. It does not apply to those situations in which a request to release the said easement is initiated by the owner.

2. The current method or situation for handling disposal of subject easements is as follows:

a. A disposal directive is received from the installation and its command declaring easements excess to its needs and directing the Corps to proceed in releasing easements to the underlying fee owner. This generates considerable time, effort, and administrative costs as set out below:

(1). TDY to the appropriate county courthouse to research records in determining the current fee owner is required. Here it is often discovered that the former fee land as acquired by the United States has been divided into several ownerships, thus necessitating preparation of individual disposal documents for each ownership. (Development of residential subdivisions and commercial areas is typical near our military bases and we may expect to find multiple ownerships with almost every easement of this type which we previously acquired.)

(2). Each owner must be contacted to inquire as to his desire to have the easement released and his willingness to pay an administrative cost. Problems encountered here are that we may or may not have the correct address because we extract this data from county records which are notoriously inaccurate. Even if the address is correct, we may or may not receive a reply. Many owners do not consider a clearance or restrictive easement a serious cloud on their title nor do the prospective purchasers or financiers. Hardship cases have also entered the picture as a problem. There are owners who state that they simply do not have the money to pay to have the easement released.

(3). For those persons indicating that they will pay the administrative fee, we then prepare documentation in the form of quitclaim deeds with appropriate land descriptions and exhibit maps; this documentation will be included in the required higher headquarter routing (for Army channels). In the past we have written descriptions to cover only that portion of the easement encompassed within each individual current fee

ownership. This has created problems because during the acquisition process we usually wrote descriptions by "drafting table survey" method. When the fee owner of the easement estate later conveyed his fee ownership to others, the owner usually obtained a land survey. In the majority of the cases, the metes and bounds of the numerous outsales rarely agreed with the calls within our deed of acquisition and were often in major conflict. Since we are compelled to dispose of only what we acquire, it became necessary to attempt to force a closure and oftentimes this could not be done.

(4). To have the quitclaim deed executed by the Secretary of the Army on its military projects, a timeframe of six to eight months (or longer) could be encountered from the date it was submitted from the District office until returned executed to our office. Other problems in the form of possible ownership changes during that lengthy timeframe were then encountered.

(5). Once the executed quitclaim deed is received, a letter is then sent to the owner requesting payment of an administrative charge--the consideration cited in the quitclaim deed. However, because of the lengthy time involved in obtaining an executed deed, we have had cases where the ownership changed or where the owner decided he no longer wanted to pay the charge. We do have original executed quitclaim deeds within our files which have never been delivered and which are no longer valid because the ownership changed or because the deeds could not be delivered for lack of payment. This then means that we would have to start the lengthy process all over again by researching county records, etc.

b. As stated above, there are owners whom we cannot locate, those who do not respond to our inquiries, those who are hardship cases, those who do not care whether the easement is released, and those who simply change their minds. We are then forced to carry these unnecessary easements on our records long after they have been declared excess by the military.

3. An example of the above is represented by the Fort Gillem project in Georgia. There were 19 tracts declared excess and approved for disposal in May 1980. Considerable time and effort was expended in attempting to dispose of all tracts. At that time there were 21 landowners of which we were able to dispose of land to ten owners (nine tracts and a portion of another tract). Eight landowners did not respond to our letters to them. The remaining three ownerships resulted in our obtaining executed quitclaim deeds from the Secretary of the Army. However, these have never been delivered because the landowners refused to pay the administrative charge--even though they had initially agreed to do so. (These deeds are no longer valid since the ownerships have changed.) We still have on our records nine tracts and a portion of another tract to be disposed. When personnel from my office were in the Fort Gillem area in August 1990, a brief perusal of county records revealed that we now have a possibility of 34 owners who may be involved in the remaining easement areas to be released. The owners would have to be contacted, descriptions and maps prepared, and the execution of the deeds obtained from the Secretary of the Army.

4. To restate, the disposal actions contained within this proposal would be strictly for those tracts for which we have been unable to achieve disposal in the past—not for those in which the landowner initiates a request to have the release accomplished. Additionally, these would be tracts in which an appraisal found there was no fair market value. The disposal would be benefiting the Government to a far greater extent than the fee owner in these cases. The procedures and revisions set out below would eliminate the problem of being unable to contact landowners or being unable to elicit a response from those whom we do contact. It would permit us to dispose of restrictive or clearance easements that have long been declared excess and to remove them from our real property holdings for accountability. Additionally, since we would dispose by acquisition tract designation only rather than by each current fee ownership, administrative costs would be decreased to approximately \$200 per quitclaim deed.

5. Set out below is a recommendation to accomplish the disposal of such easements with the most efficient use of administrative costs, time and effort. Working with a real estate attorney, a quitclaim deed was drafted which incorporated the following: (See Enclosure 1 for proposed quitclaim deed.)

a. Grantee Name - this will be written to specify the grantee as the fee owner of the land (at the time the United States acquired the easement) along with "their heirs, successors, or assigns being the current fee title owner(s) of a parcel of land described below and further identified as easement Tract _____ acquired by the United States of America for the Project Name ". This will eliminate our need to research county records (on multiple occasions) to determine the current fee owners. According to our real estate attorney, this method would release the easement to the current owner and the legality requiring a stated grantee would be met.

b. No Monetary Consideration - Para 11-125 b.(1)(g) of the proposed unpublished change to ER 405-1-12 (Enclosure 2) states that an administrative charge for the disposal action to the owner of a servient estate will be imposed, but the charge for the disposal action may be waived upon approval by CERE-M when the disposal is primarily for the benefit of the Government. The CERE-MM letter furnishing the draft revision instructs us to implement the policy guidance immediately. It further states that if implementation is not appropriate due to unusual circumstances, a request for waiver may be submitted to that office on an individual basis. Since practically all the benefit will inure to the Government in the situation involved in our proposal (those easements we have been unable to dispose of), we recommend that no administrative charge be assessed. We must face the reality of the situation—that if we continue to assess such a fee, many of the landowners will simply refuse to pay the charge and the easements will remain undisposed and in our real property records in "perpetuity". It is the recommendation of the undersigned that Savannah District be provided a blanket waiver of administrative consideration on Army military projects, rather than a waiver on an individual basis, for all clearance and restrictive easements with no appraised fair market value in order that we

Comparison to
Air Force

may implement the proposed quitclaim deed. The restrictions set out within the delegation of authority for the District Engineer to approve and execute certain Department of Air Force conveyances do not require an administrative charge. It simply states that "conveyance of an easement may be without monetary consideration when it is determined that the easement has no value in relation to the present use of the present or future disposal of the dominant estate". Our real estate attorney states that the proposed quitclaim deed attached as Enclosure 1 would be a voluntary deed and therefore not need to recite a consideration.

c. Describe Total Tract as Acquired by U.S. - It is recommended that the description contained within the quitclaim deed be written to convey the entire tract as we acquired it, thus negating the need to write several descriptions and "force" closure on multiple parcels within each of the current fee ownerships. It will also ensure that we dispose of only what we acquire. Additionally, this would result in the preparation of one quitclaim deed per tract rather than one for each ownership. Further, if we use the grantee's "name" as proposed in 5.a. above, it will be necessary to include the total tract.

d. Delivery of Quitclaim Deed - Our real estate attorney recommended adding a clause stating that upon execution and acknowledgement of the instrument (QCD), title will pass immediately. This was done to take care of the fact that no one particular person will be receiving the quitclaim deed. Rather it is the intent to have the U.S. require recordation in the county records with a notation being placed on the entries in which the U.S. acquired said easement estate. Law requires that the deed must be delivered to the grantee or to someone on his behalf. The county records will serve on behalf of any specifically unnamed grantees (such as an heir or successor). Further, "if it clearly appears that the grantor intended that title pass at the moment of executing the deed, then the very act of signing and acknowledging will constitute a delivery".

e. Recordation of Quitclaim Deed - Although our ER 405-1-12 regulation provides that the deeds will be recorded at the expense of the grantee, I will recommend that a waiver be established at the District level on this policy. It is quite evident that the minimal (\$5 to \$7) charge required to record these deeds will be offset by the benefit of reduced administrative charges by negating the need to research names of the current owners, to contact the owners, to prepare multiple descriptions and deeds, etc.

6. The District Engineer has been delegated authority to approve and execute Department of Air Force conveyances, subject to certain restrictions, for that excess real property having an estimated fair market value of less than \$1000. (See Enclosure 3.) Because of the ease of accomplishment and cost-saving results we have experienced with this delegation, I recommend that action be initiated to implement the same delegation for Army disposal conveyances.